Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DR. JAYENDRA A. SHAH,
Petitioner,

v.

COUNTY OF LOS ANGELES, LOS ANGELES DEPARTMENT OF HEALTH SERVICES, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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361

QUESTIONS PRESENTED

1. Whether Petition for Review should have been granted by the Supreme Court of the State of California when a Plaintiff in an employment discrimination suit unequivocally proves his prima facie case and presents evidence that the employer's stated reason for the adverse employment action was pretexual?

2. Whether a Plaintiff's constitutional right to a fair trial by twelve impartial jurors is violated when admitted jury misconduct takes place and a motion for a new trial is denied?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dr. Jayendra A. Shah (hereinafter "Dr. Shah"), respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California filed November 18, 1992. Said decision denied Dr. Shah's petition for review of the decision filed August 31, 1992 of the Court of Appeal

of the State of California, Second Appellate District, Division Two which affirmed the denial of a new trial based on jury misconduct. A remittitur notice was issued on December 8, 1992 by the Court of Appeal of the State of California for the Second Appellate District, Division Two which affirmed the August 31, 1992 decision.

OPINIONS BELOW

The decision of the Supreme Court of the State of California appears in Appendix A to this Petition. The unpublished written opinion of the Court of Appeal of the State of California Second Appellate District, Division Two appears in Appendix B to this Petition. The remittitur notice dated December 8, 1992 appears in Appendix C.

JURISDICTION

The decision of the Supreme Court of the State of California was filed on November 18, 1992. The remittitur notice of the Court of Appeal of the State of California for the Second Appellate district, Division Two was filed on December 8, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

United States Constitution, Amendment XIV

TITLE VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866.
42 U.S.C. 2000 e et seq.
42 U.S.C. §1981
42 U.S.C. §1983
42 U.S.C. §1985
42 U.S.C. §1986
Cal Govt. Code Sec. 12900 et seq.

STATEMENT OF THE CASE

Petitioner, Dr. Shah through counsel filed the instant employment discrimination case on December 28, 1982 in the Superior Court of California, County of Los Angeles.

In this case Dr. Shah alleged in seven separate causes of action his employment discrimination complaint against the County of Los Angeles Department of Health Services and several doctors. The basis of the discrimination was national origin, color and seniority. In November of 1981 Dr. Shah was transferred from Long Beach General Hospital to Los Angeles/USC Hospital and then to Roybal Comprehensive Medical Center with the representation that Dr. Shah would be allowed to practice his specialty in Rehabilitation Medicine. The reason stated by Respondents for said transfer was revenue shortages. Dr. Shah was never given the position in Physical Medicine and Rehabilitation.

A trial by jury was conducted and the following evidence was presented at trial.

Dr. Shah is a medical doctor who was born in India and came to the United States in the sixties. He received his medical training in India, England, Canada and the United States.

In 1976, Dr. Shah commenced his employment with the Los Angeles County Department of Health Services at the Mira Loma facility.

In June 1979 Dr. Shah was transferred at his request to a different Los Angeles County facility, Long Beach General Hospital. Dr. Shah testified that at the time he transferred to Long Beach General in 1979, Dr. Carmody was the medical director of the facility and Dr. Sandhoff, was the assistant medical director. Dr. Sandhoff was also the supervisor of the Physical Therapy and Occupational Therapy Departments.

Dr. Shah requested the transfer in order to practice within his specialty, Physical Medicine & Rehabilitation, and it was his testimony that, following an interview with Dr. Carmody, he was offered the position of directing the rehabilitation services at Long Beach General Hospital. Dr. Shah took a $500.00 decrease in pay per month for the privilege of working in rehabilitation.

Dr. Carmody testified that during the interview with Dr.

Shah, he told him that in addition to his regular assignment, he would try to give him as much work as he could in rehabilitation.

On August 23, 1979, a memo (Pl#1) was prepared in which Dr. Shah was appointed Chief of the Rehabilitation Department and supervisor over the Physical Therapy Department, the Occupational Therapy Department and the Recreational Therapy Department. He was also designated as the Physician of Record for Skilled Nursing Service positions which were formerly held by Dr. Sandhoff.

Dr. Carmody testified that the memo directed to Dr. Shah was an attempt to satisfy and encourage Dr. Shah, but that these new supervisory duties had to be done in addition to regular assignments. Dr. Shah testified that these departments were handling a full volume of patients, which were rehabilitation patients.

Dr. Shah further testified that although he was given the title and responsibilities on paper in the memo, his relationship with the Physical Therapy and Occupational Therapy employees in fact did not change. Dr. Shah's duties and responsibilities relating to the skilled nursing facility also did not change as a result of his "promotion" to Physician in Charge.

When Dr. Shah complained about this situation, to Dr. Carmody, Dr. Carmody promised to speak with Dr. Sandhoff and assured Dr. Shah that he would actually "get" the supervisory responsibilities mentioned in the memo. Thereafter he refused to see Dr. Shah.

Dr. Shah testified that when he came back from his active duty in the Air Force in the Spring of 1980 Dr. Sandhoff told him to write some notes and bring charts up to date and to make progress notes concerning care given to patients for a time period for which Dr. Shah was not at the hospital. Dr. Shah testified that he refused to do that but agreed to see all fifty (50) patients immediately and commence preparing proper progress reports as of that day. Dr. Shah testified that Dr. Sandhoff demanded that Dr. Shah draft the fraudulent progress reports.

Dr. Shah further testified that Dr. Sandhoff and Dr. Carmody, acting in concert, refused to allow Dr. Shah to transfer acutely ill patients to the acute medical floor in compliance with hospital policy and that the level of care available in the skilled nursing service was inadequate for the care of the acutely ill patients.

On July 10, 1980, a memo was issued from Dr. Carmody reassigning Dr. Shah out of the skilled nursing service to another job at the hospital. This job was clinic services, which is similar to outpatient walk-in clinic.

In a memo dated May 7, 1981, (Pl#4)) Dr. Carmody indicated that a Physical Medicine and Rehabilitation Clinic would be established in four days. Dr. Carmody testified that the creation of the new department was done in an attempt to help Dr. Shah and the reason why the hospital was able do that was because an additional doctor Clough was now on staff and could provide some coverage which Dr. Shah had previously provided.

On or about May 10, 1981, subsequent to the issuance of the above described memorandum, Dr. Shah was informed by the personnel department that he was not authorized to perform evaluations or provide supervision for the employees in the physical therapy, occupational or recreational therapy departments.

Dr. Shah testified that when he complained, the result was a memorandum dated May 18, 1981 (Pl#4) directed to Dr. Shah from Dr. Hassan J. Tabbarah which stated that the clinic was on a trial basis and that Dr. Tabbarah "remained" in charge of the three physical rehabilitation services which were Dr. Shah's responsibility according to the memo of August 23, 1979.

Dr. Shah further testified that on October 29, 1981, he received a certified letter informing him that he should report to the Los Angeles County USC Medical Center on November 2, 1981, and his failure to do so could result in "separation" from county service.

Dr. Shah testified that he immediately complained to Dr. Carmody that he should not be transferred from Long Beach because he had seniority, and because of his medical restrictions. On October 30, 1981 Dr. Shah hand carried a letter from his personal physician stating that Dr. Shah had a physical limitation and that he was not to drive more than 14 miles one way going to and from his employment and had certain restrictions affecting bending and lifting.

Dr. Shah further informed Dr. Carmody that the work at the USC County Hospital required driving beyond the mileage restrictions that his doctor had placed upon him due to his medical

condition. He further asked to be allowed to remain at Long Beach General.

Dr. Shah testified that he was informed that a budget cutback was projected and that he was going to be transferred to the U.S.C. County Hospital in Los Angeles where he could perform his specialty as a rehabilitation doctor.

Dr. Carmody testified that he caused Dr. Shah to be transferred because of his specialty in physical medicine and rehabilitation and the fact that no work was left in that field in Long Beach General Hospital and further that Dr. Shah was a rehab specialist, and that this was Dr. Shah's chance to work in his specialty.

Dr. Joseph K. Indenbaum, director of medical personnel for the county health services, testified through his deposition and stated that if a physician is declared surplus at a facility he was either laid off, transferred or reassigned if there was no place for him at the facility. The doctor stated that a physician who was surplus was entitled to displace. An employee who is a surplus is entitled to take the job of a person in a similar classification with lower seniority. Dr. Indenbaum, testified that his job was to identify the person in that same or similar classification to whose job Dr. Shah was entitled to if he in fact remained surplus at the facility at which he was currently assigned. Dr. Indenbaum admitted that Dr. Shah remained in surplus.

Dr. Shah testified that Dr. Iswaran, Dr. Desai and Dr. Chesluck were all junior to him, who were employees at the Long Beach General Hospital and were permitted to remain at Long Beach.

Dr. Sol Bernstein, the medical director for the Los Angeles County University of Southern California Medical Center, testified that he told Dr. Shah on the morning of November 2, 1981 that there were certainly no vacancies in physical medicine, that a reduction was planned for the service as a part of the budgetary reduction therefore, Dr. Shah would be assigned to the emergency department.

Dr. Shah testified that he visited Dr. Bernstein on Friday, October 30, 1981, and was told that he had to report for work on Monday, November 2, 1981 or he would be terminated. However,

Dr. Bernstein refused to give Dr. Shah any information regarding his future work assignment or vacancies in the Physical Medicine and Rehabilitation Department at USC County Hospital.

That on that same day, Dr. Shah testified that he drove back to Long Beach General Hospital and told Dr. Carmody that there was no work for him in the Rehabilitation Department and that Dr. Shah would not be placed in rehabilitation. However, Dr. Carmody told Dr. Shah that he would have no other choice other than to go to the County U.S.C. Hospital.

Dr. Shah further testified that on Monday, November 2, 1981, he did report for work at the USC County Hospital, where he was informed by the hospital administrator that he was to see Dr. Bernstein, the medical director for the facility. On November 2, 1981 Dr. Bernstein told Dr. Shah that he could not go to work in the rehabilitation department.

Dr. Bernstein testified that there was no vacancy in physical medicine and that the department services were being reduced as part of the budgetary reduction, however, he would offer Dr. Shah work in the walk-in general clinic.

Dr. Shah testified that he was, in fact, budgeted for the Physical Medicine and Rehabilitation Department, although his working assignment would be in the emergency clinic.

Dr. Shah thereafter testified that Dr. Carmody was called from Dr. Bernstein's office on a telephone conference call and Dr. Carmody told Dr. Bernstein to do what he wanted to do with Dr. Shah as "it's your problem."

Dr. Shah testified that Dr. Bernstein told him that even though Dr. Bernstein was the medical director, he could not force department heads to take Dr. Shah and that Dr. Calle, the head of the rehabilitation department refuses to take him. Dr. Shah testified that his repeated attempts to make contact with Dr. Calle were unsuccessful. Dr. Shah was not able to obtain a reason for the refusal.

Dr. Shah further testified that he suggested to Dr. Bernstein that Dr. Calle should be forced to accept Dr. Shah because of Dr. Shah's seniority and training, but Dr. Indenbaum agreed with Dr. Bernstein that Dr. Calle cannot be forced.

According to the testimony of Dr. Fagelson, the director of

the Ambulatory Emergency Clinic, he was notified by Dr. Bernstein a few days prior to Dr. Shah's arrival that there would be a new physician assigned to work in the emergency clinic.

Dr. Fagelson also testified that when he was notified that Dr. Shah would be assigned to work in his clinic due to physician "cascade" he requested Dr. Bernstein to bump someone else because there was no vacancy in his department. Dr. Fagelson testified that Dr. Bernstein refused to bump someone else, but explained that Dr. Shah would not be counted in the emergency clinic budget. Dr. Fagelson testified that he was angry about Dr. Shah being forced on him by Dr. Bernstein.

According to Dr. Fagelson's testimony, that same day he introduced Dr. Shah to Dr. Gail Anderson, the Chairman of the Department, who was Dr. Fagelson's supervisor. Dr. Anderson was very angry at the idea that someone was assigned to his department of which he had no prior knowledge and no input in the decision. Dr. Shah testified that when he met Dr. Anderson, Dr. Anderson's initial statement was "work or leave."

Dr. Shah thereafter testified that he spoke to Dr. Fagelson who told Dr. Shah that he did not like foreign medical graduates followed by the statement indicating that Dr. Fagelson did not like non-internists. Dr. Shah further testified that in the same conversation Dr. Fagelson stated that he also did not like full-time county employees because he could not fire them, and additionally that he had just fired a Dr. Shah two weeks prior. Dr. Fagelson denied or did not recall his discriminatory remarks however admitted the remark about firing another Dr. Shah, only to withdraw it upon reading his deposition.

Dr. Shah testified that he was escorted by Dr. Fagelson to the walk-in clinic (also called the ambulatory emergency clinic), where there existed some 20 cubicles and Dr. Shah was informed that there was no place for him to place his coat or bag.

Dr. Shah testified that he was informed that his job duties were to go from cubicle to cubicle and examine patients and that he would be performing his own blood and urine laboratory tests, which work Dr. Shah had not done in his career with Los Angeles County, as these tasks are normally done by interns and new doctors. Dr. Shah was also informed that he would have no nurse

to assist him and that he was merely to "keep moving".

Dr. Shah testified that Dr. Bernstein shortly thereafter transferred Dr. Shah to Roybal Comprehensive Health Clinic, where he would be working with Dr. Ortega. That on Monday, November 16, 1981 Dr. Shah reported to the Roybal Clinic in East Los Angeles, some 26 miles from his residence. This was a temporary transfer offered to ease the situation until a solution could be reached by Dr. Bernstein and Dr. Indenbaum regarding Dr. Shah's assignment.

Dr. Shah testified that he was assigned to the medical outpatient specialty clinic, however, after two months at Roybal, he was transferred to the walk-in emergency clinic full time. There were five rooms, with only one doctor and four or five nurses and 30 to 40 patients per day with the worst types of acute emergencies.

Dr. Shah testified that this type of clinic work lasted six weeks but was causing great physical and mental strain. Dr. Ortega, the medical director of the Roybal facility, refused to make any adjustments to accommodate Dr. Shah's deteriorating medical condition and even refused a compromise rotation schedule which Dr. Shah worked out with the other doctors.

On March 3, 1982, Dr. Shah left the position at Roybal on a workmen's compensation disability.

On April 12, 1982, a document was generated on Los Angeles County Department of Health Services letterhead (Pl #10) which listed by seniority the doctors transferred and retained at Long Beach General Hospital, some of whom were junior to Dr. Shah. The document also listed the physicians assigned to the rehabilitation department at USC. Dr. Myint started with the county on July 1, 1978 and was junior to Dr. Shah, Dr. Kushnadason had no starting date listed, but was known by Dr. Shah to have started three years after he did.

That upon the completion of the presentation of the evidence, the jury returned in thirty minutes with a defense verdict.

Subsequent to the verdict, the plaintiff obtained declarations from two of the jurors and one alternate.

The declarations established that the jurors were denied their request to examine and discuss the exhibits which had been admitted into evidence.

The declarations established that there was no consideration by the jury of the facts presented during trial and that the jurors who executed the declarations expressed that this impropriety prevented them from presenting their position based upon an analysis of the evidence, to the other jurors.

A motion for a new trial based on jury misconduct was filed by the Petitioner, which motion was denied by the Los Angeles County Superior Court.

Petitioner appealed to the Court of Appeal of the Second Appellate District, Division Two seeking a reversal of the judgment of the trial court or in the alternative to be granted a new trial.

By a decision filed August 31, 1992 the Court of Appeal, Second Appellate District, Division Two affirmed the judgment of the Superior Court of the County of Los Angeles, Florence T. Pickard, Judge.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND AFFECTS ALL EMPLOYMENT DISCRIMINATION CASES.

A prima facie case of employment discrimination was proved by Petitioner in accordance with the case law of this Court, but the Supreme Court of the State of California abused its discretion in denying Petitioner's Petition for review which challenged the decision of the Court of Appeal of the State of California, Second Appellate District.

Petitioner's instant employment discrimination lawsuit was based on Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000 e et seq.), and the Civil Right Act of 1866, 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §1985, 42 U.S.C. §1986 and Cal Govt. Code secs. 12900 et seq. Petitioner's state and federal causes of action of employment discrimination were tried by the jury in state court.

Dr. Shah in his complaint alleged and proved at trial that the Respondents acts of transferring him to different hospitals was a concerted effort and a continuous course of conduct and scheme to *discriminate against him due to his ethnicity. Additionally, that the* Respondents disregarded Dr. Shah's medical disability and his seniority at Long Beach General Hospital. Dr. Shah further alleged and proved that the Respondents policies and practices continued to discriminate against persons of different ethnicity, national origin and color in ways which tend to deprive them of employment opportunities and advancement, all in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000 e et seq.) and 42 U.S.C. §1981 respectively. Dr. Shah further alleged and proved that by transferring Dr. Shah to less satisfactory positions and locale, Respondents pursued a policy and practice of discriminating against physicians of certain national origin, ethnicity and color with respect to employment opportunities and conditions of employment.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), this Court set forth the basic allocation of burdens and orders of presentation of proof in a Title VII case. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employees rejection." Id., at 802, 93 S. Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id., at 804, 93 S. Ct., at 1825. See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

Under both state and federal anti-discrimination legislation, the employee must first establish a prima facie case of wrongful i.e. racial, or gender - based termination. This maybe done by showing (1) that he or she belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the

employer continued to seek applicants from persons of complainant's qualifications. See McDonnell Douglas, 411 U.S., at 802, 93 S. Ct., at 1824.

This Court in McDonnell Douglas, also held that this standard for a prima facie case in a racial discrimination case is not inflexible, as "the facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily applicable in every respect in different factual situations" Id., at 802, n. 13, 93 S. Ct., at 1824 n.13.

In this case Dr. Shah proved that he was of Indian descent. That in June of 1981, he became an American Board Certified Practitioner in his specialist field of Physical Rehabilitation Medicine. That his basic medical education was outside of the United States. Dr. Shah's specialty training was in the U.S.A. That he became employed with the County of Los Angeles as a physician in the year 1976. That he transferred from his first hospital at Mira Loma to Long Beach General Hospital in 1979 as a Physiatrist Specialist. That the transfer was based upon a promise of being placed over the rehabilitation services offered by the Hospital. Dr. Shah accepted a reduction in pay in the amount of $500.00 per month in order to accept a promotion of Chief of Service and a title of Physiatrist (PM& R) Specialist. That the title of Acting Chief of Physical Medicine & Rehabilitation was given to him, and shortly thereafter removed. That Dr. Shah during the first year at the hospital was never permitted to carry out the responsibilities of the position he was informed was his. That Dr. Shah was for a second time led to believe that he was in charge of the Rehabilitation Services Department, however within five days following the initial memo placing him in that position, a second memo was circulated removing all authority and control from the position.

Dr. Shah further proved that no evidence was produced to establish that he was a substandard physician, nor that any complaints were made by his co-workers, patients nor superiors regarding his performance as a physician specialist. Dr. Shah proved that he was well qualified to perform in the field he requested and had continued his medical education and became American Board Certified in the area of Physical Medicine and Rehabilitation (PM& R) in June of 1981.

Testimony was given by Dr. Shah that he was requested to perform illegal acts by his superiors such as writing reports for a period of a few weeks on patients who he had not seen nor examined which he refused to do.

It was established by Dr. Shah that he was transferred from his position at Long Beach General Hospital in October of 1981, which was near his home, disregarding his seniority at Long Beach General Hospital and his physical disability.

That at the time of the transfer, Dr. Shah had certain work related traumatic medical disabilities which were known to the administrators of the various medical facilities which prevented his driving to the hospitals to which he was being assigned.

Dr. Shah further established that he had more seniority with the County than physicians who were allowed to remain at the Long Beach Hospital. That the county policy was to honor the seniority of the physicians and to allow senior individuals to maintain their employment, forcing the younger physicians to be transferred. That he was promised that the transfer to the downtown U.S.C. Los Angeles County medical facility would be one in which he would be working in his specialty of rehabilitation. That when Dr. Shah reported to his new assignment he learned that he had been deceived again after working six (6) years with the County, and that Dr. Shah would be assigned to a clinic walk-in position without an office, without a place to place his coat/bag and that he would be performing tasks that are normally performed by lab technicians, residents and interns. That Dr. Shah was not wanted at his new work assignment. That Dr. Shah's new boss was openly hostile to him and did attempt to make his work at the hospital as difficult, demeaning and unrewarding as he could.

Dr. Shah was thereafter ordered to a clinic in East Los Angeles and was informed that the duty was to be on a temporary basis, of which the clinic director was unaware. Dr. Shah was not physically able to perform the type of work which he was ordered to perform at East Los Angeles Clinic. That he was told by Dr. Bernstein that budget cuts made it impossible for him to work in rehabilitation, however his pay was budgeted to that department.

Dr. Shah established that he was a victim of misrepresentation at the time he left his employment at the Long

Beach Hospital, was denied his seniority privileges at both the Long Beach facility where he was not permitted to remain and the downtown facility where he was not permitted to work in the specialty he had prepared for. That he was openly criticized by work superiors who did not want to accept him because of his specialty, his educational background and his ethnic background. That although Dr. Shah was informed by Chief of Medical Personnel, the medical director at U.S.C. County Medical Center that a department head could not be forced to accept a particular physician, Dr. Shah's immediate superior at the Los Angeles County Hospital was forced to accept Dr. Shah even though he did not wish to have him in his department of Emergency-Ambulatory Medicine.

Dr. Shah's petition for review to the Supreme Court of the State of California pointed out that the Court of Appeal of the State of California in affirming the trial court's judgment failed to examine the facts stated above and the direct evidence submitted in support of Dr. Shah's prima facie case of employment discrimination.

Dr. Shah's petition for review established that the Court of Appeal of the State of California incorrectly states that the only evidence of any nature that even smacked of racial or ethnic bias was Dr. Shah's testimony regarding statements allegedly made by Dr. Fagelson that he did not like foreign-educated doctors.

The petition for review demonstrated that the Court of Appeal failed to examine the failure of Respondents to provide a nondiscriminatory explanation for the following adverse actions. (1) The Respondents refusal to honor Dr. Shah's seniority at Long Beach General Hospital. The refusal to honor Dr. Shah's seniority at U.S.C. where he was not permitted to cascade the junior Rehabilitation physicians. (2) The refusal of Dr. Calle to accept Dr. Shah in the Physical Medicine and Rehabilitation (PM& R) department with no explanation. (3) The refusal to honor his medical restrictions. Furthermore there was testimony from the witnesses which established that Dr. Shah was assigned a volume of work exceeding his medical restrictions, and was forced to perform duties usually assigned to new resident doctors or interns and lab technicians. Testimony was presented that Dr. Shah additionally suffered the humiliation of racially bigoted remarks, and assigned to

a position where he was informed that he was not wanted and for which he was grossly overqualified as a physician with many years of experience and with Board Certification in a specialty.

Not only did Dr. Shah prove his prima facie case, but also established that any lawful reason given by the employer in the instant case for it's conduct was a mere pretext. Dr. Carmody's statements that Dr. Shah was placed on the surplus list in order to satisfy his desire to work in his specialty, conflicted with the memorandum dated October 27, 1981, and Dr. Berstein's and Dr. Indenbaum's testimony which identified the reason was county-wide budgetary cuts. Dr. Bernstein, medical director for U.S.C. offered the following "non-discriminatory" explanation for the refusal to accept Dr. Shah in the rehabilitation department, the PM& R department has no vacancy and is scheduled for budgetary cutbacks. In fact the evidence established that the Dr. Shah's salary was budgeted and paid out of the PM& R department and hence that Dr. Bernstein's explanation was a pretext.

Additionally, testimony by Dr. Indenbaum established that this adverse action was contrary to county seniority practice at that time. Dr. Bernstein testified that he could not force any department head to take an individual, however Dr. Fagelson, director of the department to which Dr. Shah was assigned testified that he was ordered to take Dr. Shah. Dr. Anderson was angry as he was ordered to take Dr. Shah. Additionally, Dr. Ortega testified that he had been ordered to accept Dr. Shah in November 1981.

The pretexual explanation given by Respondents for the transferring of Dr. Shah from department to department was Proposition 13 which mandated countywide curtailment of medical services and staffing. Said explanation was readily accepted by the Court of Appeal of the State of California, Second Appellate District in light of all the evidence direct and circumstantial provided by Dr. Shah that the "non-discriminatory explanation" was a pretext.

The Court of Appeal ignored the fact that Dr. Shah's salary was paid out of the Physical Medicine and Rehabilitation Department. Therefore budgetary cutbacks could not be a valid reason for Dr. Shah's transfer out of Long Beach General Hospital. Proposition 13 did not effect his position at Long Beach General Hospital nor at U.S.C. Los Angeles County Medical Center, and

Dr. Shah had seniority at both hospitals - Long Beach General Hospital and Los Angeles County Medical Center U.S.C.

In the instant case Dr. Shah had established a prima facie case of employment discrimination and it became the duty as a matter of law for the Respondents to offer a bona fide and good faith reason for the discrimination. The respondents failed to show a lawful reason for their discrimination, whereby warranting a reversal of the trial court's judgment.

In denying Dr. Shah's petition for review of the decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, the Supreme Court of the State of California failed to follow the standards set by this Court in McDonnell and Burdine with respect to burdens of proof in an employment discrimination case.

Employment discrimination based on race, color, religion, sex or national origin is prohibited by Title VII of the Civil Rights Act of 1964. It is illegal under Title VII to discriminate among other things in the hiring and firing; compensations, assignment or classification of employees; transfer, promotion, layoff or recall; and other terms and conditions of employment.

Discriminatory practices with respect to assignment, transfer and conditions of employment based on Dr. Shah's race, color and national origin took place in this case. Dr. Shah pursued all avenues of administrative remedies all to no avail. After exhausting his administrative remedies, Dr. Shah filed his detailed employment discrimination complaint in the Superior Court of Los Angeles County in the State of California. Dr. Shah now applies to this Court for relief as the State courts failed to protect his civil rights to be free from employment discrimination based on his race, color and national origin. Dr. Shah urges this Court to redress the injuries suffered by him and grant him the relief which he seeks as the State courts failed to uphold Dr. Shah's rights.

II. THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

A. Certiorari should be granted because the Supreme Court of the State of California deprived Petitioner of his constitutional right to a fair trial by twelve impartial jurors when it denied Petitioner's Petition for review after admitted jury misconduct took place.

It is well settled that jury misconduct can be the basis for the awarding of a new trial.

Jury misconduct can be established by juror affidavits so long as the declaration consists of proof of overt acts, objectively ascertainable, however proof relating to subjective reasoning process of juror is not admissible and cannot be considered.

Dr. Shah in the instant case presented declaration of two jurors (Renee Holmes and Dessie M. Tyson) and one alternate (Clarence W. Hopson). The declarations stated that the foreman did not allow the jurors to look at the exhibits that had been introduced at the trial by Dr. Shah, and discouraged anyone else from doing so.

Before retiring, the jury was instructed as follows:

> "...The attitude and conduct of jurors at the beginning of their deliberations are very important. It is rarely helpful for a juror on entering the jury room to express an emphatic opinion on the case or to announce a determination as to -- a determination to stand for a certain verdict. When one does that at the outset, a sense of pride maybe aroused, and one may hesitate to change a position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter. You must be impartial judges of the facts."

The jury foreman in the instant case immediately became a partisan, and attempted to influence the jurors' vote prior to discussion of the evidence. Mr. Navarro, the jury foreman, ignored or refused requests from the jurors to examine the documentary evidence, and was supported by another juror that such examination was not necessary. Declaration of Renee Holmes, Dessie M. Tyson and alternate Clarence W. Hopson established these facts.

Refusal to consider the reasonable request of one juror to examine and discuss the documentary evidence carries with it a substantial likelihood of suppressing similar requests from other jurors. The request of at least two of the jurors to view and discuss the documents were not considered.

The court had further instructed:

> "In the jury room, it is your duty to discuss the case in order to reach an agreement if you can. Each of you must decide the case for yourself, but should do so only after considering the views of each juror."

The jurors in this case failed to discuss the case. The jurors who wanted to view the evidence and further discuss the merits of the case were not only discouraged but were told that there was no need for a discussion as they already had a nine to three vote. The misconduct involved was uncontested, no counter declarations were produced by the defense.

When no affidavits or declarations are introduced to counter evidence of jury misconduct, proffered on new trial motion, acts are deemed established, and the only issue is whether they are harmful or prejudicial.

It is well settled that a rebuttable presumption of prejudice arises from any jury misconduct. When misconduct of the jurors is shown it is presumed to be injurious to the defendants unless the contrary appears. However the presumption maybe rebutted by proof that no prejudice actually resulted.

In the instant case a reasonable probability of actual harm to Dr. Shah resulted from the misconduct. The nature of the charge of discrimination was explained to the jury as seldom proved by direct testimony, and that it must be inferred, or proved by circumstantial

evidence. The court instructed the jury:

> "Evidence (of discrimination) maybe either direct or circumstantial. Direct evidence proves a fact without an inference, and if true, conclusively establishes that fact. Circumstantial evidence proves a fact from which an inference of the existence of another fact maybe drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts. The law makes no distinction between direct and circumstantial evidence as to the degree of proof required. Each is a reasonable method of proof. Each is respected for such convincing force as it may carry."

Petition for Review by the Supreme Court of California should have been granted as employment discrimination can be proven through direct or circumstantial evidence. The Court of Appeal committed error when it ignored all the circumstantial evidence presented by Dr. Shah to prove his case of employment discrimination. It is well settled law that the fact that evidence is "circumstantial" does not mean that it cannot be "substantial".

In Dr. Shah's Petition for Review to the Supreme Court of California, Dr Shah pointed out that eventhough the Court of Appeal in it's decision states that the activities of the jurors did constitute misconduct, it goes on to state that there was no reasonable probability that Dr. Shah suffered any prejudice, in that it is unlikely a different verdict would have been rendered.

The Petition for Review further showed that the Court of Appeal committed grave error when it found that the failure to examine the physical evidence which consisted entirely of memos, hospital records and county records would not have resulted in a different verdict.

The Petition for Review also pointed out that the Court of Appeal's conclusion that the declarations of the jurors that they were not allowed to examine the physical documents and that the jurors in the minority might have used the exhibits to change the mind of at least one majority juror are pure speculation. It was pure

speculation on the Court of Appeal's part to assume that an examination of the physical evidence would not have resulted in a different verdict.

The documentary evidence, when viewed separate and apart from the testimony of the witnesses, established facts, added weight and credibility to certain witnesses and illuminated a pattern of treatment which could only be viewed as discriminatory in violation of the civil rights of Dr. Shah. During trial, the Respondents attorneys objected to the complete reading of these documents into the record, stating that "the documents speak for themselves." Thereafter the jurors were not allowed to review the documents admitted into evidence whereby denying Dr. Shah's right to have his evidence properly reviewed by the jury.

Dr. Shah's Exhibit #1 was a memo of August 23, 1979 which named Dr. Shah as Chief of Rehabilitation Services and designated him as physician of record of the skilled nursing facility.

Dr. Shah's Exhibit #2 was a memo dated July 10, 1980 which reassigned Dr. Shah to Clinic Services and restored Dr. Sandhoff as physician-of-record of the skilled nursing facility.

Dr. Shah's Exhibit #3 was a memo dated December 2, 1980 which reassigned Dr. Shah to El Cerrito (temporarily), or face loss of County employment. Other doctors assumed his responsibilities at Long Beach General Hospital.

Dr. Shah's Exhibit #4 was a memo dated May 7, 1981 which established a Physical Medicine and Rehabilitation Clinic at Long Beach General Hospital with Dr. Shah as Chief. Eventhough this memo designated Dr. Shah as the Chief every attempt by Dr. Shah to perform his supervisory duties was thwarted by the PM& R Department.

Dr. Shah's Exhibit #5 was a memo dated May 11, 1981 which specified that the new PM&R Clinic was on a trial basis only and placed Dr. Tabbarah in charge of the Physical Therapy, Occupational Therapy, and Recreational Therapy.

Dr. Shah's Exhibit #7 was a letter dated October 30, 1981 from Dr. Latteri specifying Dr. Shah's medical restrictions, which included restricted driving of 14 miles to and from employment to Dr. Shah's home.

Dr. Shah's Exhibit #8 was a letter dated October 27, 1981

addressed to Dr. Shah transferring him to Los Angeles County - University of Southern California Medical Center on November 2, 1981, a distance of 32 miles from his home, or to face a loss of county employment.

Dr. Shah's Exhibit #10 was a document listing names of physicians junior to Dr. Shah who were permitted to remain at Long Beach General Hospital, and names of physicians junior to Dr. Shah who were permitted to remain in the PM&R Clinic-U.S.C.

Dr. Shah Exhibit #10a was a document which showed that Dr. Shah was listed as the only surplus physician in the Physical Medicine and Rehabilitation Specialty. This document verified the representations made to Dr. Shah that he was in fact surplussed in order to allow him to bump the junior physicians in his classification (specialty) at U.S.C.

Dr. Shah's Exhibit #13 was a memo transferring him to Roybal Comprehensive Clinic.

The documentary evidence illuminated a pattern of treatment which Dr. Shah received over the course of five years of employment with the County of Los Angeles.

It is well established in civil law that misconduct can be recognized by a pattern as well as by individual acts of abuse. The documents entered in evidence provided a detailed, timely testimonial to the steady deterioration of Petitioner's medical career despite good performance and despite seniority under the administration of the County of Los Angeles, who acted in concert consistently and in bad faith to the detriment of Dr. Shah. In spite of Dr. Shah's constant and strenuous efforts to resolve these problems by negotiation, by telephone, in person, and then by grievance and compromise, no avenue of resolution remained except litigation.

The Petition for Review demonstrated that the Court of Appeal erred when it stated in it's decision that an examination of the documents shows that there was no "smoking gun" which would have altered the jury's result.

The jurors were never given the opportunity to examine the thirteen (13) pieces of physical evidence. It was the duty of the jury to properly examine all evidence before rendering a decision. In the instant case, the jury failed to follow the Judge's jury instruction

whereby committing jury misconduct.

It was pure speculation on the part of the Court of Appeal to assume that eventhough jury misconduct occurred, there was no reasonable probability that Dr. Shah suffered any prejudice.

B. The Sixth Amendment of The United States Constitution provides that an individual has a constitutional right to a fair trial by 12 impartial jurors.

It is well settled that a litigant in a jury trial has a constitutional right to a fair trial by twelve (12) impartial jurors. U.S.C.A. Const. Amend. 6.

The denial of a request to view the documentary evidence, or the improper influencing of a juror to act contrary to jury instructions constituted a violation of the Dr. Shah's constitutional right to a fair trial based on examination and consideration of all the evidence.

An element of impartiality can be defined as a willingness to examine and weigh all evidence prior to making a decision. The documentary evidence was not read in its entirety into the court transcript, therefore facts and inferences available only from Dr. Shah's documents, which advanced Dr. Shah's claim of discrimination, was not part of the jury's decision making process.

Contrary to the decision of the Court of Appeal of the State of California for the Second Appellate District, Division Two, Dr. Shah was prejudiced by the fact that the jury disregarded instructions and failed to examine the proof from which an impartial jury could have concluded that a pattern of discrimination practices against Dr. Shah took place.

Dr. Shah was denied his due process right to a fair trial under the Fourteenth Amendment of the United States Constitution. The State Courts of California failed to give Dr. Shah his day in court. Despite the admission of jury misconduct the State Courts of California failed to grant Dr. Shah a new trial.

Petitioner asks this Court to protect his right to a fair trial by impartial jurors as guaranteed by the United States Constitution. Only this Court can remedy the unfair treatment received by the

Petitioner herein in pursuing his employment discrimination case in the State Court system in California. Justice demands that this Court grant the instant writ of certiorari and that Dr. Shah be given his day in court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision of the Supreme Court of the State of California or in the alternative remand the case to either State Court or Federal Court for a new trial.

Dated: February 12, 1993

Respectfully Submitted,

Jayendra A. Shah, M.D.
Petitioner, Pro se

APPENDIX A

Supreme Court
FILED
Nov 18, 1992
Robert Wandruff
Deputy Clerk

Second Appellate District, Division Two, No. B054244
S029111

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JAYENDRA A. SHAH, M.D., Appellant

v.

COUNTY OF LOS ANGELES, Respondent

Appellant's petition for review DENIED.

F. GEORGE
Acting Chief Justice

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

DR. JAYENDRA A. SHAH,	)	B054244
	)	(Super. Ct. No.C436892)
Plaintiff and Appellant,	)	Court of Appeal-Second Dist.
	)	FILED
vs.	)	Aug 31 1992
	)	
COUNTY OF LOS ANGELES, et al.,	)	JOSEPH A. LANE, Clerk
	)	I. KING, Deputy Clerk
Defendants and Respondents.	)	
	)	
	)	
	)	

Appeal from a judgment of the Superior Court of Los Angeles County. Florence T. Pickard, Judge. Affirmed.

Jayendra A. Shah, in pro. per., for Plaintiff and Appellant.

De Witt W. Clinton, County Counsel for Los Angeles County, S. Robert Ambrose, Assistant County Counsel, Patrick T. Meyers and Alan K. Terakawa, Principal Deputies County Counsel, for Defendants and Respondents.

Appellant Jayendra Shah, M.D., filed an employment discrimination case against respondents County of Los Angeles, and Drs. Carmody, Indenbaum, Ortega and Fagelson. A jury trial resulted in a defense verdict. This pro. per. appeal follows the denial of a motion for a new trial based on jury misconduct. Affirmed.

ISSUES

The issues set forth by appellant are (1) whether there was sufficient evidence to support the jury's verdict, and (2) whether there was jury misconduct warranting a new trial.

FACTS

Appellant is a medical doctor, born in Bombay, India. He received his education in Bombay, London, Montreal, and the United States.

In 1976, appellant commenced his employment with the County of Los Angeles at the Mira Loma facility.

In June of 1979, appellant requested and received a transfer to Long Beach General Hospital, where he hoped to practice his specialty in physical medicine and rehabilitation ("PM & R"). Unfortunately, appellant was assigned most frequently to other areas of practice, such as the walk-in clinic and emergency medicine. He attributes those assignments to the lack of leadership by the medical director (Dr. Carmody) and the conflict that developed between appellant and the assistant medical director, Dr. Sandhoff. However, Dr. Carmody testified that Long Beach General Hospital was simply not budgeted to sustain a physical therapy or rehabilitation section.

In any event, the effects of Proposition 13 struck the Los Angeles County Department of Health Services with full force in 1981, necessitating cutbacks in services and layoffs and transfers of personnel. Even physicians were not exempt.

Dr. Carmody was required to reduce his staff of physicians

from 19.5 to 5.5,[1]/ and made the determination to keep doctors who specialized in internal medicine. As appellant did not have that specialty, he was one of 14 physicians who Dr. Carmody placed on the "surplus" list.

Due to appellant's seniority, he was not laid off. Instead, he was transferred to Los Angeles County/U.S.C. Hospital ("County/USC"). As there were no openings in PM & R, appellant was directed by Dr. Bernstein (the medical director of that facility) to work in emergency medicine under Dr. Fagelson.

Appellant was extremely unhappy with that assignment and, within a week, prevailed on Dr. Bernstein and Dr. Indenbaum (the medical director for the County of Los Angeles) for another position. Accordingly, Dr. Bernstein arranged for appellant to meet with Dr. Ortega, the medical director of the Roybal Clinic. Subsequent to that meeting, appellant was voluntarily transferred to Roybal. After approximately one and one-half months, he was given emergency care duties, which was the slot promised by Dr. Ortega. However, appellant was displeased with that duty, and filed his third grievance in the approximate three months he stayed at that facility.

Appellant then made a worker's compensation disability claim, based on stress and his bad back. He was subsequently adjudged to have a 42.5 percent disability. Currently, he continues to work in the medical profession, though not with the County of Los Angeles.

DISCUSSION

(1) Sufficiency of the Evidence

When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the judgment.

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[1] Some physicians only worked part-time.

(Bowers v. Bernards (1984) 150 Cal. App. 3d 870, 873-874.) Further, all evidentiary conflicts are to be resolved on appeal in favor of the respondent, so long as the evidence is sufficient to support the judgment. (Shamblin v. Brattain (1988) 44 Cal. 3d 474, 479.)

In a trial for racial discrimination in employment, it is the burden of the plaintiff to prove a prima facie case of racial or ethnic discriminatory practices by the employer. Once the plaintiff overcomes that hurdle, the burden shifts to the employee to show a lawful reason for its conduct. If the employer does so, the burden falls back to the employee to prove the proffered justification is a sham. (Gonzales v. MetPath, Inc. (1989) 214 Cal. App. 3d 422, 426.)

Appellant argues that he indeed proved a prima facie case of racial discrimination, and the evidence in rebuttal was insufficient to overcome his case. We disagree.

The only evidence of any nature that even smacked of racial or ethnic bias was appellant's testimony regarding statements allegedly made by Dr. Fagelson when appellant was assigned to him at County/USC. Appellant claimed that Dr. Fagelson said that he did not like foreign-educated doctors. Dr. Fagelson denied making that statement, but admitted being upset because appellant's assignment was made without his prior knowledge or input. Dr. Fagelson said that his displeasure was directed at his superiors and not at appellant. Further, the thrust of appellant's complaint against respondents is that his transfer from Long Beach General Hospital was due to bias. The episode with Dr. Fagelson took place after appellant had been transferred.

The counter his lack of direct evidence, appellant argues that the examination of a variety of facts lead circumstantially to the conclusion that he had been discriminated against because he is Indian. Appellant states that there were never any complaints about the quality of his work; physicians with less seniority remained at Long Beach General Hospital; other physicians with less seniority were allowed to continue in PM & R at County/USC; and he was given demeaning, first-year intern assignments at County/USC and Roybal. He thus deducts that the only logical explanation for the transfers and assignments was racial discrimination.

That argument, as the jury found, rings hollow when weighed against the evidence presented by respondents, to wit: Proposition 13 mandated drastic countrywide curtailment of medical services and staffing; 14 physicians were transferred or laid off from Long Beach General Hospital; of the 5.5 doctors remaining at Long Beach General Hospital, one was Indian and one was Ceylonese; and at least one of the physicians who remained in PM & R at County/USC was Indian. Further, the fact that appellant immediately filed a grievance while at County/USC and three grievances in the brief time he was a Roybal, combined with his tenuous relationships with the physicians in authority, could reasonably have led the jury to the conclusion that appellant's problems were based on personality and not on race.

(2) Jury Misconduct

At the motion for new trial, appellant presented the declarations of two jurors (Renee Holmes and Dessie Tyson) and one alternate (Clarence Hopson). The gist of the declarations was that the foreperson did not want to look at the exhibits that had been introduced into evidence and discouraged anyone else from doing so; "no one else" wanted to look at the exhibits; a preliminary vote was taken that showed the panel to be 9-3 in favor of the defense; and, as a result of being unable to look at the exhibits, the three jurors voting for appellant were precluded from making an effective argument to persuade any of the other nine jurors to change their vote.

It appears that the declarations were admissible under Evidence Code section 1150[2]/ in that the complaints about not being

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[2] Evidence Code Section 1150 provides: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent

able to see the exhibits describe objective acts, as opposed to the subjective reasoning processes of an individual juror. (See People v. Hutchinson (1969) 71 Cal. 2d 342,349; Continental Dairy Equip. Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 385-387.) However, those portions of the declarations that assert that the jurors in the minority might have used the exhibits to change the mind of at least one majority juror are pure speculation.

The physical evidence consisted almost entirely of memos, hospital records, and county records. An examination of those documents shows that there was no "smoking gun" which would have altered the jury's result. Therefore, even if the activities of the jurors did constitute misconduct, there is no reasonable probability that appellant suffered any prejudice, in that it is unlikely a different verdict would have been rendered. (Hasson V. Ford Motor Co. (1982) 32 Cal. 3d 388, 417.)

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to or dissent from the verdict or concerning the mental processes by which it was determined."

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

S/Nott, J.

NOTT

We concur:

S/Fukuto, Acting P.J.
FUKUTO

S/Suzukawa, J.*
SUZUKAWA

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* Assigned by the Chairperson of the Judicial Council

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 2

Jayendra Shah
620 West Orangewood Ave.
Captain's Quarters Motel
Anaheim, CA 92802

RE: Shah, Jayendra A.
vs.
Los Angeles, County of
2 Civil B054244
Los Angeles No. C436892

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 08/31/92 is now final.

* * Affirmed In Full. * *

___Appellant _X_Respondent to recover costs.
___Each party to bear own costs.
___Costs are not awarded in this proceeding.

Joseph A. Lane, Clerk

Dec 8, 1992 By:

Deputy Clerk